No. 85-1626

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of all others similarly situated,

Petitioners,

v.

LUKENS STEEL COMPANY, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. What is the single federal characterization, for statute of limitations purposes, to be given to all claims alleging violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981?

2. Under the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), should the new limitations selection rule announced in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), be applied retroactively to alter the applicable limitations period in a case which was pending at the time *Wilson* was decided?

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REPORTS OF OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, dated November 13, 1985, the Order of that Court denying plaintiffs' Petition for Rehearing and the separate statement of Judge Garth sur Denial of Petition for Rehearing, dated January 7, 1986, are reported at 777 F.2d 113 (3d Cir. 1985) and are reproduced at *Pet. App.* A-1 to A-58.[1]

1. References in this Brief to pages in the Appendix filed with the Petition for Writ of Certiorari are in the form "*Pet. App.* A-___."

The unreported Memorandum and Orders of the District Court dated August 2, 1984, awarding injunctive relief against the defendants, are reproduced at *Pet. App.* A-163 to A-164. The Opinion of the District Court dated February 13, 1984, on the liability issues in this case, is reported at 580 F. Supp. 1114 (E.D. Pa. 1984) and is reproduced at *Pet. App.* A-64 to A-162. The unreported Memorandum of the District Court dated June 16, 1975, applying the Pennsylvania six-year statute of limitations at 12 P.S. § 31 to plaintiffs' claims under 42 U.S.C. § 1981, is reproduced at *Pet. App.* A-59 to A-63.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 25, 1985. (*Pet. App.* A-175 to A-176.) Petitioners' timely Petition for Rehearing and/or Rehearing *en banc* was denied on January 7, 1986, 777 F.2d at 137 (*Pet. App.* A-55 to A-58), and the Petition for Certiorari in this matter was filed within 90 days of that date. Certiorari was granted on December 1, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981

42 U.S.C. § 1982

42 U.S.C. § 1983

42 U.S.C. § 1988

12 P.S. § 31 (repealed)

12 P.S. § 34 (repealed)

(The foregoing statutes are reproduced at *Pet. App.* A-177 to A-179.)

STATEMENT OF THE CASE

This employment discrimination class action was filed in the United States District Court for the Eastern District of Pennsylvania on June 14, 1973. The named individual plaintiffs are seven black employees of defendant Lukens Steel Company ("Lukens"), a Pennsylvania corporation engaged in manufacturing and selling steel products. The plaintiff United Political Action Committee of Chester County is a community organization formed to combat race discrimination in the county in which Lukens is based. Some of its members are employees of Lukens. The international and local Union defendants (the "Unions") are the certified collective bargaining agents for all of Lukens' hourly employees.

In their Complaint, plaintiffs alleged that they and the class they sought to represent had been the victims of pervasive racial discrimination by Lukens and the Unions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1981 ("Section 1981"). In an unpublished Opinion dated June 16, 1975, the District Court certified the case as a class action. (*Pet. App.* A-59 to A-63.) In that Opinion, the District Court also held that the applicable statute of limitations for plaintiffs' claims under Section 1981 was the six-year Pennsylvania limitations provision set forth at 12 P.S. § 31, which covered a broad range of tort and contract claims, including claims of interference with existing and prospective contractual relations. (*Pet. App.* A-60.) Because suit had been filed on June 14, 1973, the certified class was held to include "all black persons employed by the defendant Lukens Steel Company at any time on or after June 14, 1967." (*Pet. App.* A-60.)

Through 1980, the parties in this case engaged in extensive pretrial discovery and motions, including more than 100 depositions of class members and others. During 1980, the District Court held a 32-day trial at which 157 witnesses testified and more than 2,000 exhibits were introduced. On February 13, 1984, more than ten and one-half years after this case was filed, the District Court entered an Opinion finding that Lukens and the Unions had violated Title VII and Section 1981 by intentionally discriminating against four of the

named plaintiffs and against the plaintiff class. 580 F. Supp. 1114 (E.D. Pa. 1984). (*Pet. App.* A-64 to A-162.)

The District Court found that Lukens had intentionally discriminated against the plaintiff class in initial job assignments; promotions to craft positions; promotions to salaried positions; denial of incentive pay to one seniority grouping; discharge of employees during their probationary period; and toleration of racial harassment. 580 F. Supp. at 1163-64. (*Pet. App.* A-160 to A-161.) The District Court also found that the Unions had discriminated against the plaintiff class by intentionally failing to challenge discriminatory discharges of probationary employees; intentionally failing to assert race discrimination as a ground for grievances; and intentionally tolerating racial harassment. 580 F. Supp. at 1164. (*Pet. App.* A-161.)

Based on its findings, the District Court entered judgment on the class-wide liability issues largely in favor of plaintiffs. (*See Pet. App.* A-163.) On August 2, 1984, the District Court entered injunctions in favor of the plaintiff class from which Lukens and the Unions appealed. (*Pet. App.* A-163 to A-174.)

The Court of Appeals affirmed in part, reversed in part and vacated and remanded in part. 777 F.2d 113 (3d Cir. 1985). (*Pet. App.* A-1 to A-54.) With respect to the statute of limitations for plaintiffs' Section 1981 claims, the Third Circuit held that this Court's Opinion in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985)—which dealt only with claims under 42 U.S.C. § 1983 ("Section 1983")—required that all claims under Section 1981 be characterized as personal injury claims. 777 F.2d at 117-20. (*Pet. App.* A-7 to A-13.) *See Al-Khazraji v. St. Francis College*, 784 F.2d 505, 513 (3d Cir.) ("*Wilson v. Garcia* ... made the *Goodman* decision inevitable."), *cert. granted*, 107 S. Ct. 62 (1986). Accordingly, the Court of Appeals held that *Wilson* overruled the Third Circuit's unbroken line of pre-*Wilson* decisions characterizing actions under Section 1981 as actions for wrongful interference with economic rights and thus subject to Pennsylvania's six-year limitations period. Instead, the Court of Appeals held that *Wilson* required application of Pennsylvania's two-year limitations pro-

vision at 12 P.S. § 34, which was limited to claims for damages arising out of bodily personal injuries. *Id.*[2]

Although the Court of Appeals recognized that the selection of the two-year Pennsylvania limitations statute was "seemingly anomalous" and "not fully consistent" with Pennsylvania law, it stated, without discussion, that its decision would be applied retroactively to shorten the statute of limitations for plaintiffs' Section 1981 claims in this case from six years to two years. 777 F.2d at 120 & n.3. (*Pet. App.* A-13.) The Court of Appeals did not apply the three-part retroactivity analysis required by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

Solely because of its statute of limitations determination, the Court of Appeals vacated the District Court's findings of discrimination in promotions to salaried positions and toleration of racial harassment and remanded those findings to the District Court to reconsider whether there was sufficient evidence of class-wide violations within the shorter limitations period. 777 F.2d at 121. (*Pet. App.* A-14 to A-16.)[3] The effect of the Court of Appeals' statute of limitations determination was to eliminate from eligibility for relief for proven violations of Section 1981 many class members whose employment by

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2. Both 12 P.S. §§ 31 and 34 were repealed on July 9, 1976, after this case was filed. A new limitations statute was enacted in Pennsylvania on that date, effective June 27, 1978. *See* 42 Pa.C.S.A. §§ 5501 *et seq.* The new limitations statute was expressly declared inapplicable to cases filed before its enactment. *See Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 477 n.2 (3d Cir. 1978), *cert. denied*, 444 U.S. 632 (1979).

3. In its other holdings, the Court of Appeals:

(a) Ruled that no named plaintiff could represent the class on the initial job assignment discrimination claim and therefore vacated and remanded the finding of class-wide discrimination in initial job assignments for the District Court to consider possible intervention by a new class representative;

(b) Shortened by approximately two months the limitations period which the District Court had applied to the claims of discrimination against the Unions under Title VII;

(c) Reversed the finding of discrimination in denial of incentive pay; and

(d) In all other respects affirmed the District Court's decision.

777 F.2d at 130-31. (*Pet. App.* A-35 to A-36).

Lukens terminated between June 15, 1967, and June 13, 1971. In addition, certain named plaintiffs and class members who continued to work for Lukens after June 14, 1971, but who had suffered from violations of Section 1981 during the previous four years, were left without any remedy for such violations.[4]

Judge Garth dissented from the panel Opinion with respect to the statute of limitations determination. 777 F.2d at 130-37. (*Pet. App.* A-36 to A-52.) Judge Garth concluded that *Wilson* did not require that claims under Section 1981 receive a characterization, for statute of limitations purposes, identical to claims under Section 1983. 777 F.2d at 132. (*Pet. App.* A-37 to A-39.) After demonstrating that the purpose, history and application of Section 1981 were substantially different from the purpose, history and application of Section 1983, and that the primary focus of Section 1981 was to secure economic rights, Judge Garth concluded that it would be inappropriate to characterize claims under Section 1981 as personal injury claims. 777 F.2d at 132-38. (*Pet. App.* A-39 to A-52.) Instead, Judge Garth reasoned that claims under Section 1981 should be characterized, for statute of limitations purposes, as claims for injury to economic rights, and that the most analogous Pennsylvania statute of limitations was the six-year provision at 12 P.S. § 31 which had been applied by the District Court. *Id.*

Plaintiffs filed a timely Petition for Rehearing and/or

4. For example, the District Court found that Lukens had discriminated against named plaintiff Ramon L. Middleton by delaying his admission to a new seniority unit during the period from January 4 through April 5, 1971. 580 F. Supp. at 1134-35. (*Pet. App.* A-96 to A-98.) The District Court found that Mr. Middleton was entitled to an adjustment of his seniority because of this discrimination. *Id.* Yet because the violation occurred before the new Section 1981 limitations date applied by the Court of Appeals, Mr. Middleton would be entitled to no relief if the Court of Appeals' decision is affirmed.

Similarly, the District Court found that named plaintiff Lymas L. Winfield suffered discrimination from 1967 through 1975 by being denied a promotion to the position of foreman. 580 F. Supp. 1161-63. (*Pet. App.* A-155 to A-158.) Under the Court of Appeals' limitations ruling, Mr. Winfield would be entitled to no relief for the racial discrimination which occurred during the first four of those eight years.

Rehearing *en banc* with respect to the Court of Appeals' statute of limitations determination. The Court of Appeals denied this Petition on January 7, 1986, with Judges Garth, Gibbons and Becker voting to grant rehearing *en banc*. 777 F.2d 137-38. (*Pet. App.* A-55 to A-58.) On April 4, 1986, plaintiffs filed a Petition for Writ of Certiorari in connection with the Court of Appeals' statute of limitations determination. Certiorari was granted on December 1, 1986.[5]

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit erred in reading *Wilson*—which dealt only with claims under Section 1983—to require that all claims under Section 1981 be characterized, for statute of limitations purposes, as personal injury claims. Although the reasoning of *Wilson* may require a uniform federal characterization for all claims filed under Section 1981, selection of that characterization requires an independent analysis of the purpose, history and application of Section 1981. The characterization chosen must also be consistent with federal law and promote the interests of uniformity and certainty.

The purpose, legislative history and actual application of

5. On June 6, 1986, the Unions filed a Petition for Writ of Certiorari (No. 85-2010) in connection with the Court of Appeals' determinations on the issue of the Unions' liability. Certiorari was granted on December 1, 1986, and the Unions are to file their brief on the issue of Union liability on the same date as this Brief. This Court has consolidated the Writs of Certiorari granted to plaintiffs (No. 85-1626) and to the Unions (No. 85-2010).

On April 4, 1986, Lukens filed a Petition for Writ of Certiorari (No. 85-1645) in connection with certain determinations of the Court of Appeals concerning Lukens' liability. On July 17, 1986, plaintiffs and Lukens executed a Consent Decree resolving all issues in the case between Lukens and plaintiffs. On November 17, 1986, this Court granted the Joint Motion of Lukens and plaintiffs to defer consideration of Lukens' Petition for Certiorari until the District Court determined whether to approve the settlement between plaintiffs and Lukens. The District Court held a hearing in connection with the proposed settlement on October 6, 1986, and approved the Consent Decree on January 22, 1987. Assuming that there are no appeals taken from the District Court's approval of the Consent Decree, Lukens will withdraw its Petition for Certiorari. The Consent Decree does not affect plaintiffs' claims against the Unions.

Section 1981 differ, in material respects, from that of Section 1983. In this connection, the language, background and use of Section 1981 fully support this Court's statement that Section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). When measured by the standards of *Wilson*, Section 1981 claims are most appropriately characterized as claims for tortious interference with existing or prospective contractual relations. *See generally* Restatement (Second) of Torts at Division 9, §§ 766 *et seq.* (1979). This characterization is fully consistent with the remedial purpose of Section 1981 and will promote uniformity and certainty.

For these reasons, the Court of Appeals erred when it applied to plaintiffs' Section 1981 claims the two-year Pennsylvania limitations period governing actions for damages for bodily injury. Instead, the Court of Appeals should have applied Pennsylvania's six-year limitations provision covering a wide range of tort and contract claims, as the Court of Appeals had consistently done in cases involving Section 1981 and 42 U.S.C. § 1982 before *Wilson*.

If, however, the Court should determine that *Wilson* requires that Section 1981 be characterized as a personal injury statute, the criteria established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), mandate that *Wilson* not be applied retroactively to change the limitations period in cases such as this one. The uniform national characterization requirement established in *Wilson* was a new and unforeshadowed principle of law which starkly contrasted with previous statements by this Court. The new requirement also overruled precedent in every Court of Appeals. Under such circumstances, the elimination of civil rights remedies, through retroactive application of *Wilson*'s unforeseeable new limitations selection rule, would be manifestly inequitable.

This case presents a particularly compelling example of the inequity which would result from retroactive treatment of *Wilson*. Plaintiffs' action was timely filed under the Third Circuit's pre-*Wilson* limitations rules. Plaintiffs actively litigated their claims for twelve years under those pre-*Wilson* rules. What is more, plaintiffs *prevailed* after a lengthy trial.

To now deny some of the named plaintiffs and other members of the plaintiff class a remedy for *proven* racial discrimination, on the basis of an unforeseeable change in limitations doctrine, is profoundly unfair.

Nor would retroactive application of *Wilson* further *Wilson*'s goals of uniformity, certainty and minimization of litigation. Instead, retroactive application of *Wilson* would impede uniformity by creating differences in limitations periods between actions filed at the same time, depending on whether they had been finally determined when *Wilson* was decided. Indeed, in the Third Circuit, uniformity has been wholly abandoned by applying *Wilson* retroactively in some cases and prospectively in others. *See Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986). In cases like the present one, retroactive alteration of pre-*Wilson* limitations rules has spawned, not minimized, collateral litigation over both the limitations issue and other substantive issues. For these reasons, *Wilson* should not be applied retroactively to alter pre-*Wilson* limitations law in cases which were pending when *Wilson* was decided.[6]

Finally, because the Court of Appeals' erroneous statute of limitations ruling led that court to vacate and remand the District Court's findings of discrimination by toleration of racial harassment and denial of promotions to salaried positions, 777 F.2d at 121 (*Pet. App.* A-14 to A-16), those findings should be reinstated by this Court.

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6. It may be appropriate to consider the retroactivity of *Wilson* before considering the Section 1981 characterization issue, for if *Wilson* is not to be applied retroactively, the characterization issue is not raised in this case. *Cf. Michigan v. Payne*, 412 U.S. 47, 49 n.3 (1973) (Court has consistently declined to reach out to resolve unsettled questions regarding the scope or meaning of new constitutional decisions in cases in which it holds such decisions nonretroactive). Nonetheless, because the questions on which Certiorari was granted raised the characterization issue first, plaintiffs discuss that issue first in this Brief.

ARGUMENT

I. Claims Under Section 1981 Should Be Characterized, For Statute Of Limitations Purposes, As Actions For Tortious Interference With Existing Or Prospective Contractual Relations.

A. *Wilson* Did Not Determine The Characterization, For Statute Of Limitations Purposes, To Be Given Claims Under Section 1981.

In *Wilson*, this Court determined "[t]he most appropriate state statute of limitations to apply to claims enforceable under § 1 of the Civil Rights Act of 1871, which is codified in its present form as 42 U.S.C. § 1983." 105 S. Ct. at 1940. In reaching its determination, this Court rendered the following three distinct holdings:

> (1) Under 42 U.S.C. § 1988 ("Section 1988") federal law governs the characterization, for statute of limitations purposes, of Section 1983 claims, 105 S. Ct. at 1943-44;
>
> (2) All Section 1983 claims should be given the same characterization, without regard to the specific facts of each case, *id.* at 1944-47; and
>
> (3) In light of the history, purpose and application of Section 1983, all claims under *that* statute should be characterized as personal injury actions, *id.* at 1947-49.

This Court's reasoning in reaching the first two of its holdings in *Wilson* applies to Section 1981 as well as Section 1983.

It does not follow, however, that Section 1981 should be given the same characterization as Section 1983. As Judge Garth noted in dissent in this case, the decision in *Wilson* did not state or imply that the "personal injury" limitations characterization for actions brought under Section 1983 was also applicable to actions brought under Section 1981. 777 F.2d at 131-32. (*Pet. App.* A-38 to A-39.) *See also Nazaire v. TWA*, 42 F.E.P. Cases 882, 888 n.5 (7th Cir. 1986); *Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416, 1436-39 (D.C. Cir. 1986) (Buckley, J., concurring in result); *DiPasalgne v. Elby's Family Restaurants*, 640 F. Supp. 1312 (S.D. Ohio 1986); *Pender v. National Railroad Passenger Corp.*, 625 F. Supp. 252,

254-55 (D.D.C. 1985). To the contrary, this Court reached its third holding in *Wilson* by examining the history, purpose and application of Section 1983 *alone*, and did not examine or discuss Section 1981. The rationale of *Wilson* requires that the appropriate uniform characterization for claims under Section 1981 be determined by examining the purpose, history and application of that section, and not Section 1983.[7]

An examination of the purpose, history and use of Section 1981 will help assure that the characterization chosen will lead to selection of statutes of limitations which reflect the state legislatures' policy assessments with respect to claims which are as close as possible to those bottomed on Section 1981. As this Court stated in *Wilson*:

> By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action. However, when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

105 S. Ct. at 1945, citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). The greater the difference between the federal claim and the state cause of action selected for characterization purposes, the greater is the likelihood that the limitations period for the federal claim will not reflect a proper balancing of the policies of repose and enforcement. Deference to the state legislatures' weighing of the

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7. The Courts of Appeals are in conflict over whether Sections 1981 and 1983 must be given identical characterizations, for statute of limitations purposes. In *Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986), the Court reached the same result as the Third Circuit in the present case. The Seventh Circuit, following Judge Garth's dissent in the present case, has concluded that Sections 1981 and 1983 should not be characterized identically. *Nazaire v. TWA*, 42 F.E.P. Cases 882, 888 n.5 (7th Cir. 1986).

relevant policy concerns—where such concerns are not inconsistent with federal law—not only increases the likelihood that the limitations period selected will be of an appropriate length but also promotes important federalism interests. *See Board of Regents v. Tomanio*, 446 U.S. 478, 491-92 (1980); *Burnett v. Grattan*, 104 S. Ct. 2924, 2935 (1984) (Rehnquist, J., concurring in the judgment).

B. The Purpose Of Section 1981 Differs From The Purpose Of Section 1983.

In gauging the purpose of a statute, it is axiomatic that a court must first look to the language of the statute. When this Court in *Wilson* examined the language of Section 1983, it found it "useful to recall that . . . [t]he high purposes of . . . [Section 1983] make it appropriate to accord the statute 'a sweep as broad as its language.'" 105 S. Ct. at 1945 (citation omitted). The language of Section 1983 is exceedingly broad—it covers "the deprivation of *any* rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C. § 1983 (emphasis added). Indeed, Section 1983, by its language, does not create any substantive *rights*, but rather provides *remedies* for a vast range of claims. 105 S. Ct. at 1945-46, 1948.

Section 1981, by contrast, confers upon persons in the United States "a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). *See also Burnett v. Grattan*, 104 S. Ct. at 2927 n.2. With respect to the focus of those rights, this Court has already spoken clearly:

> [Section 1981] on its face relates primarily to racial discrimination in the making and enforcement of contracts.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975). *See also Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971) ("It is, after all, the right to 'make and enforce contracts' which is protected by § 1981.").

Equally significant is the language of 42 U.S.C. § 1982 ("Section 1982"), which was enacted as a "companion" to

Section 1981 in the Civil Rights Act of 1866. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383 (1982). That provision specifically guarantees the economic rights to "inherit, purchase, lease, sell, hold and convey real and personal property." Because Sections 1981 and 1982 have a common origin, this Court has held that they should be construed *in pari materia*. *E.g., Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973). *See also General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 390 n.17. Section 1983, however, has a different origin and therefore even the same words may be construed differently. *District of Columbia v. Carter*, 409 U.S. 418 (1973).

In order to characterize claims under Section 1981 (and Section 1982) as personal injury claims, the language of those provisions must be radically distorted from its plain meaning. Fairly read, that language compels the conclusion that Sections 1981 and 1982 were designed to protect against tortious interference with existing or prospective contractual relations.

C. The History Of Section 1981 Differs From The History Of Section 1983.

In concluding that Section 1983 should be characterized, for statute of limitations purposes, as a personal injury statute, this Court, in *Wilson*, looked largely to the history of Section 1983, which was originally enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. Stressing the *physical* threats to which blacks were exposed after the Civil War, this Court recapitulated that history as follows:

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the south, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. *See Brisco v. LaHue*, 460 U.S. 325, 336-340 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents:

> "While murder is stalking abroad in disguise, whi'e whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong. 1st Sess., 374 (1871) (remarks of Rep. Lowe).

105 S. Ct. at 1947 (footnote omitted). Similarly, in *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986), in the course of selecting the Alabama limitations statute applicable to Section 1983 claims in light of *Wilson*, the Eleventh Circuit said:

> The paradigmatic personal injuries covered by [Section 1983], those that motivated the Congress to take action, were acts of intentional and direct violence on the part of the Ku Klux Klan. . . .
>
> The debates focused on arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation, perpetrated by the Klan.

763 F.2d at 1255-56 (citation omitted). *See also Hobson v. Brennan*, 625 F. Supp. 459, 468 (D.D.C. 1985).

In stark contrast, the history of Section 1981 reinforces the conclusion that its focus is principally economic in nature. *Nazaire v. TWA*, 42 F.E.P. Cases 882, 888 n.5 (7th Cir. 1986); *Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416, 1437-39 (D.C. Cir. 1986) (Buckley, J., concurring in result); *Goodman v. Lukens Steel Co.*, *supra*, 777 F.2d at 132-34 (Garth, J., dissenting in part). The provision's language originated in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, which was passed pursuant to the Thirteenth Amendment. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982).[8] The "principal object" of the 1866 Act was the eradication of the Black Codes. *Id.* at 386. The primary focus of those infamous laws, enacted by Southern legislatures, was to deny the freedmen any freedom to enter into contracts or to acquire property. Representative Windom, in the House debate on the 1866 Act, described the principal provisions of various Black Codes, then summarized the existing situation and the rationale of the Act in the following words:

> [Negroes] are denied a home in which to shelter their families, prohibited from carrying on any independent business, and then arrested and sold as vagrants because they have no home and no business.
>
> Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. . . . Do you call that man free who cannot choose his own employer, or name the wages for which he will work? Do you call him a freeman who is denied that most sacred of all possessions, a home? Is he free who cannot bring a suit in court for the defense of his rights? Sir, if this be liberty, may none ever know what slavery is.

Cong. Globe, 39th Cong., 1st Sess. 1160 (1866). *See also* K. Stampp, *The Era of Reconstruction: 1865-1877* 80 (1965) (summarizing major provisions of the Black Codes).

Representative Lawrence reiterated this rationale in arguing to override the Presidential veto of the 1866 Act:

> It is idle to say that a citizen shall have the right to life,

8. The relevant portion of Section 1 of the 1866 Civil Rights Act was substantially reenacted as Section 16 of the Civil Rights Act of 1870, which was enacted to enforce the Fourteenth Amendment. *Id.* Section 1983, on the other hand, was originally enacted as part of the Civil Rights Act of 1871, and is based *solely* on the Fourteenth Amendment. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972).

> yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor. It is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by State authority of the means by which citizens may exist.

Cong. Globe, 39th Cong., 1st Sess. 1833 (1866).

In the Senate, Senator Trumbull, Chairman of the Senate Judiciary Committee and a principal draftsman of the 1866 Act, specified the rights to which it was directed, describing them as "the great fundamental rights":

> [T]he right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.

Cong. Globe, 39th Cong, 1st Sess. 475 (1866), *quoted* in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968). Plainly these rights reflect an individual's economic interests, not the protection of his physical person from injury. *See Al-Khazraji v. St. Francis College*, 784 F.2d 505, 519 (3d Cir.) (Adams, J., concurring) ("§ 1981 was intended to place blacks on an equal footing with whites by prohibiting racial discrimination in private contracts," citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 427-28), *cert. granted*, 107 S. Ct. 62 (1986).

Indeed, Senator Trumbull subsequently reiterated the economic focus of the Act:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, *the right to the fruit of their own labor, the right to make contracts, the right to buy and sell* and enjoy liberty and happiness . . . .

Cong. Globe, 39th Cong., 1st Sess. 599 (1866), *quoted in McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 290 (1976) (emphasis added). As this Court stated in *Jones v. Alfred H. Mayer Co.*, in discussing the history of Section 1982:

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a *dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man*. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to *buy* whatever a white man can *buy*, the right to live wherever a white man can live.

392 U.S. at 443 (footnotes omitted) (emphasis added).

In short, the "object" of the 1866 Act was:

> to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (remarks of Rep. Windom). *See also Cong. Globe*, 39th Cong., 1st Sess. 504 (Sen. Howard), 1124 (Rep. Cook), 1151 (Rep. Thayer) (1866); authorities cited in *Goodman v. Lukens Steel Co.*, 777 F.2d at 131-38 (Garth, J., dissenting in part) (*Pet. App.* A-39 to A-45).

Thus, the legislative history of Sections 1981 and 1982, in addition to their language, inescapably counsels that those Sections, unlike Section 1983, were principally directed to the protection of economic rights.[9]

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9. This Court previously has referred to and relied upon the different legislative histories and purposes of Sections 1981 and 1982, on the one hand, and Section 1983, on the other hand, to show that the statutes should be interpreted differently. *See District of Columbia v. Carter*, 409 U.S. 418 (1973) (holding that the District of Columbia was not a "State or Territory" under Section 1983, although it was under Section 1982). *See also Monroe v. Pape*, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., dissenting in part) ("Different problems of statutory meaning are presented by two enactments deriving from different constitutional sources.") In this connection, it is important to note that Section 1981 is limited to discrimination on the basis of race, but extends to private conduct as well as government conduct. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). *See Johnson v. Railway Express*

D. The Overwhelming Majority Of Section 1981 Cases Involve Claims Of Interference With Existing Or Prospective Contractual Relations.

Characterizing Section 1981 cases as personal injury actions would also result in the application of state limitations periods for actions which bear no resemblance to the vast majority of cases which have been brought under Section 1981. An analysis of the annotations to Section 1981 in the United States Code Annotated shows that almost 80% of all such annotations (aside from those referring to cases in which courts held that no claim was stated under Section 1981) refer to employment discrimination cases. An additional 13% of such annotations refer to cases alleging discrimination in other contracts or in access to public or private facilities or housing. Thus, more than 90% of the annotations refer to cases which arose out of some existing or prospective contractual relationship.[10]

Indeed, as recently as 1977, the Third Circuit could find only three cases construing the "equal benefit" and "like punishment" clauses of Section 1981, although there was "an

Agency, Inc., 421 U.S. 454, 460 (1975); *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431, 439-40 (1973). Claims under Section 1983 are not limited to claims based on race, but reach only wrongs committed under color of state law, not private conduct. C. Wright, *The Law of Federal Courts* § 22A (4th ed. 1983).

10. The analysis performed by plaintiffs' counsel consisted of classifying each annotation according to the subject matter of the claim asserted, as disclosed by the annotation itself and, where necessary, by reading the opinion referred to, and then adding the number of annotations in each subject matter classification. All annotations contained in the 1981 main volume and the 1985 pocket part were reviewed, except for 7 state court cases and 21 older cases appearing in "Federal Cases" or volumes of the United States Reports before volume 101. A total of 1,653 annotations were reviewed. Of these, 227 referred to cases in which the court held the plaintiff failed to state a claim under Section 1981. Of the remaining 1,426 annotations, 1,123 referred to cases based on allegations of employment discrimination, and 186 referred to cases based on allegations of discrimination in other contracts or access to public or private facilities or housing. While no attempt was made to eliminate duplications caused by the appearance of more than one annotation to any case, it is hardly likely that doing so would substantially change the compelling nature of these figures.

abundance of case law under Section 1981 dealing with claims of deprivation of the guaranteed right 'to make and enforce contracts'." *Mahone v. Waddle*, 564 F.2d 1018, 1027 & n.13 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). In vivid contrast to this Court's finding in *Wilson* that litigants have used Section 1983 to assert claims which "encompass numerous and diverse topics and subtopics," 105 S. Ct. at 1946, experience shows that the great preponderance of Section 1981 claims have hovered around only one topic—interference with existing or prospective contractual relations.

E. Claims Under Section 1981 Are Properly Characterized, For Statute Of Limitations Purposes, As Actions For Tortious Interference With Existing Or Prospective Contractual Relations.

As set forth above, the language, history and application of Section 1981 differ from that of Section 1983. When the reasoning of the Court in *Wilson* is applied to Section 1981, it is readily apparent that the single most appropriate characterization to be given claims under Section 1981 is that of actions for tortious interference with existing or prospective contractual relations.

Claims for tortious interference with existing or prospective contractual relations are familiar and are well-recognized in the laws of the various states. Such rights are described in the Restatement (Second) of Torts (1979), where Division Nine describes torts relating to "Interference With Advantageous Economic Relations" and includes Chapter 37 describing torts of "Interference With Contract or Prospective Contractual Relations." *See also* W. Prosser, *Handbook of the Law of Torts* §§ 129, 130 (4th ed. 1976).[11] Accordingly, "it is most unlikely that the period of limitations applicable to such claims ever was, or ever will be, fixed in a way that would

11. The specificity of this proposed characterization has the advantage of simplifying the determination of the applicable state statute of limitations. It will avoid the confusion engendered by the general personal injury characterization prescribed for Section 1983 by *Wilson*. *See Mulligan v. Hazard*, 106 S. Ct. 2902, 2903 (1986) (White and Marshall, JJ., dissenting from denial of *certiorari*); *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1255 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986).

discriminate against federal claims, or be inconsistent with federal law in any respect." *Wilson v. Garcia*, 105 S. Ct. at 1949.

Such a characterization also recognizes the vast difference between the nature of the acts giving rise to Section 1981 and 1982 cases, on the one hand, and the normal personal injury case, on the other hand. Denial of equal employment or other contractual opportunities is a far cry from a motor vehicle accident, a slip and fall, or even an assault and battery. The essence of the normal personal injury case is negligence, whereas Sections 1981 and 1982, and the tort of interference with existing or prospective contractual relations, require proof of intent. Restatement (Second) of Torts, §§ 766 *et seq.* (1979). Unlike most personal injury cases, which involve proof only of a single act, Section 1981 and 1982 cases normally involve "'patterned-type behavior, frequently involving documentary proof.'" *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 903 n.26 (3d Cir. 1977), *quoting Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606 (E.D. Pa. 1975). Accordingly, " 'the passage of time is less likely to impede the proof of facts.' " *Id.*

Moreover, the goal of personal injury cases is to recover damages, whereas injunctive relief is normally a major goal of Section 1981 and 1982 cases, and any "damages" consist largely of back pay, which this Court has repeatedly recognized as an equitable remedy. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16 (1975); 42 U.S.C. § 2000e-5(g). Thus, the nature of the remedy in Section 1981 and Section 1982 cases makes inappropriate the characterization adopted in *Wilson* for Section 1983: "the tort action *for recovery of damages* for personal injuries." 105 S. Ct. at 1947 (emphasis added).

These major differences between personal injury actions and claims under Sections 1981 and 1982 lead to the conclusion that characterization of such claims as personal injury claims would arbitrarily disregard the state legislatures' policy determinations underlying their selections of appropriate limitations periods for various kinds of actions. Thus, it would

contravene the spirit of 42 U.S.C. § 1988, which requires that deference be given to the policy decisions of the various states underlying their respective statutes of limitations, as long as these state policies are not inconsistent with federal policies. *See Robertson v. Wegmann*, 436 U.S. 584, 588-94 (1978); *Burnett v. Grattan*, 104 S. Ct. 2924, 2935 (1984) (Rehnquist, J., concurring in judgment).

In this connection, most states allow longer limitations periods for claims of injuries to economic rights than for personal injury claims:

> Most states have concluded that economically grounded causes of action will more frequently arise from patterned and well-documented courses of conduct than will claims for personal injury. . . . There is no reason we should not respect these policy choices, grounded as they are in real and substantial differences between and among causes of action, in applying civil rights statutes which reflect the same differences.

Statement of Judge Garth sur Denial of Petition for Rehearing, 777 F.2d at 138. (*Pet. App.* A-57.)

Finally, the federal policy interest in minimizing litigation and encouraging conciliation would be better served by recognizing the longer economic injury statutes of limitations as applicable to Section 1981 claims. As set forth above, the vast majority of Section 1981 and Section 1982 claims relate to economic discrimination in employment or housing. Most of these claims also constitute alleged violations of other federal anti-discrimination statutes which require administrative proceedings before litigation in the federal courts. *See, e.g.*, Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Imposing the shorter personal injury statutes of limitations on such discrimination claims will force plaintiffs to sue in federal court under Sections 1981 and 1982 before awaiting the outcome of administrative proceedings. Inexorably, the important federal policy of encouraging administrative conciliation of such claims will be affected adversely. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 468-76

(1975) (Marshall, J., concurring in part and dissenting in part).

For these reasons, all claims under Section 1981 should be uniformly characterized as actions for tortious interference with existing or prospective contractual relations. When they are so characterized, the Third Circuit has already declared that the applicable Pennsylvania limitations period is the six-year provision at 12 P.S. § 31. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977). Accordingly, the Court of Appeals' selection in this case of a uniform personal injury characterization, and its application of Pennsylvania's two-year personal injury limitations provision, should be reversed.

II. *Wilson* Should Not Be Applied To Alter Limitations Periods In Cases Which Were Pending At The Time *Wilson* Was Decided.

The Court of Appeals squarely recognized that the District Court's application of the six-year Pennsylvania limitations provision would have been affirmed if this Court's *Wilson* decision had not intervened. As the Court of Appeals stated:

> Although the district Judge was correct in forecasting that we would adopt a six year limitation period in an employment case, his prescience, like ours, was limited. Neither he, nor this Court, foresaw the Supreme Court's ruling that all 1983 cases should be governed by a uniform statute of limitations—that provided by the states for personal injury. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (Apr. 17, 1985).

777 F.2d at 118 (*Pet. App.* A-8). By retroactively applying *Wilson*'s unforeseen change in limitations selection rules, the Third Circuit left some of the named plaintiffs and other class members in this case without any remedy for *proven* racial discrimination, *see* note 4 above, even though the claims of those persons were timely under the limitations rules in effect before *Wilson*. In reaching this conclusion, the Third Circuit erred.

Plaintiffs are mindful that questions of retroactivity of newly announced principles "are among the most difficult of those which have engaged the attention of courts, state and federal. . . ." *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940). But because the Constitution does not compel retroactive application of judicial decisions, *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), this Court has not hesitated to adjust the temporal reach of newly announced rules in order to accommodate fundamental principles of equity and fairness. *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975); Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745 (1983).

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court concluded that a new and unforeseeable legal principle which had been announced in an earlier case, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), would not be applied retroactively to alter the limitations periods which had been applied by the lower federal courts before the decision in *Rodrigue*. The Court in *Chevron* described the following three-tiered analytical framework for determining the retroactivity of principles newly announced in civil cases:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied

retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

The Court this term reaffirmed the continuing applicability of the *Chevron* analysis to retroactivity determinations in civil cases. *Griffith v. Kentucky*, 55 U.S.L.W. 4089, 4091 n.8 (U.S. Jan. 13, 1987). Just as that analysis led in *Chevron* to nonretroactive treatment of *Rodrigue*, so does it require nonretroactive application of the new limitations rule promulgated in *Wilson*. Indeed, in *Wilson* itself, in the course of affirming the Tenth Circuit's establishment of the "new" limitations borrowing approach, this Court pointed out that the Tenth Circuit had decided not to apply the new approach "retroactively to bar 'plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced.' " 105 S. Ct. at 1941-42 n.10 (citation omitted).

A. *Chevron* And The Principles Of Nonretroactivity.

The plaintiff in *Chevron* was an individual who was injured on an off-shore artificial island drilling rig. He brought suit in federal district court in Louisiana against the owner of the drilling rig, under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* (the "Lands Act"). As of the time the suit was filed, the Fifth Circuit had squarely held that general admiralty law (including the doctrine of laches), rather than state limitations law, applied to plaintiff's claims under the Lands Act. Under principles of admiralty law, plaintiff's claims were timely filed.

While pretrial discovery was in progress, however, this Court decided *Rodrigue*, *supra*. In *Rodrigue*, the Court was faced with the issue whether, under the Lands Act, artificial off-shore drilling rigs were to be considered as vessels subject to admiralty law or as islands subject to state law. Engaging in statutory construction of the Lands Act, the Court held that the rigs were not vessels and were therefore subject to state law, not admiralty law.

The District Court in *Chevron* applied *Rodrigue* retroactively and held that Louisiana's one-year personal injury limitations provision barred plaintiff's claims. The Court of Appeals reversed this decision, holding that *Rodrigue* did not require that the Lands Act be interpreted to preclude the application of admiralty law to plaintiff's claims. On Writ of Certiorari, this Court reversed the Court of Appeals' interpretation of *Rodrigue*, but held that *Rodrigue* should not be retroactively applied to bar the plaintiff's claims in *Chevron*.

In reaching its retroactivity decision, the Court in *Chevron* emphasized that *Rodrigue* was a case of first impression in the Supreme Court and that it "effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act." 404 U.S. at 107. The Court also noted that "[r]etroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." 404 U.S. at 108. Because the purpose of the Lands Act was to afford "comprehensive and familiar" remedies to aid injured employees, the Court found it "inimical to the beneficent purpose of the Congress" to end plaintiff's lawsuit after lengthy and costly discovery. 404 U.S. at 108. As this Court held, nonretroactive application of *Rodrigue*, insofar as application of the Louisiana statute of limitations was concerned, would simply preserve plaintiff's "right to a day in Court." 404 U.S. at 108.[12]

Although *Chevron* contains the most complete discussion by this Court of the factors which control the issue of retroactivity in civil cases, *Chevron* was neither the first case nor the most recent in which this Court declined to retroactively

12. The Court explicitly noted that it was not declaring *Rodrigue* entirely nonretroactive, but rather holding "only that state statutes of limitation, applicable under *Rodrigue*'s interpretation of the Lands Act, should not be applied retroactively." 404 U.S. 108 n.10. Recognizing that retroactive application of statutes of limitations required by *Rodrigue* worked a more harsh result than retroactive application of *Rodrigue*'s substantive principles, the Court thus limited its holding to the nonretroactive application of statutes of limitations. *Id.*

apply principles of law newly announced in civil cases. *See, e.g., England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). As recently as 1982, the Court prospectively applied its decision invalidating the 1978 legislation which established the federal bankruptcy courts. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).[13]

In the wake of *Chevron*, the lower federal courts have not adopted a uniform approach to application of the *Chevron* factors. For example, some courts have read *Chevron* to require a separate retroactivity determination in each case in which a newly announced principle might be applicable. *See Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). At least one circuit, however, has rejected this approach, holding instead that under *Chevron* the retroactivity of a new principle of law should be determined only once for all claims which arose before the new principle was announced. *Simpson v. Director, Office of Workers' Compensation Programs*, 681 F.2d 81 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).[14]

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13. *Chevron* and *Marathon Pipe Line* actually reflect different levels of prospective decision making. In *Chevron*, this Court held that the new principle announced in *Rodrigue* would not apply to cases that arose before the date of *Rodrigue* although the principle had been applied retroactively to the parties in *Rodrigue* itself. Commentators term this the "quasi-prospective" approach. In *Marathon Pipe Line*, decided June 28, 1982, the Court stayed its judgment until October 4, 1982, to afford Congress an opportunity to revise the Bankruptcy Code without impairing the interim administration of the bankruptcy laws. This has been termed the "prospective-prospective" approach. Under a third approach, the "purely prospective" method, a decision applies only to cases arising after the date of the decision, and not to the parties before the Court. *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544 (1969). *See generally* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631 (1967); Note, *Prospective-Prospective Overruling*, 51 Minn. L. Rev. 79 (1966); Note, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117.

14. *Chevron* itself is arguably ambiguous on this point. Although the Court stated that the purpose and effect factor must be examined "in each case," 404 U.S. at 106-07, the Court's ultimate holding was that *Rodrigue* was to receive across the board nonretroactive application with respect to statute of limitations determinations. 404 U.S. at 108 n.10.

Some courts have held that the three *Chevron* factors are of equal weight, while others have placed greater emphasis on the first factor, calling it a threshold factor. Finally, in construing the first factor some courts have focused on the state of the law immediately before the new legal principle was announced, while other courts have looked to the state of the law at the time the plaintiff's cause of action arose. *See generally* Note, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117.

These varying approaches reflect the notion that nonretroactivity is fundamentally a creature of equity. Concepts of equity are not easily defined, but tend to vary as issues and contexts change. Indeed, the use by this Court of different levels of prospective decision-making, *see* note 13 above, emphasizes that the criteria involved must be flexible and pragmatic.

It is, therefore, important that the method used to analyze the retroactivity of *Wilson*'s new limitations rule take into account the purposes of *Wilson*. Because *Wilson* stressed the need for simplicity, uniformity and minimization of collateral litigation, the retrospective reach of *Wilson* should not be left to a case-by-case determination in the lower courts but rather should be resolved once and for all by this Court. Only by focusing broadly on the *Chevron* factors, and developing a single rule for the retroactivity of *Wilson*, can this Court accommodate the practical concerns expressed in *Wilson*.[15]

It is likewise important that the nature of statutes of

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15. Plaintiffs' submissions in the Court of Appeals and their Petition for Writ of Certiorari focused on the facts of this case, without discussing whether *Wilson*'s retroactivity should be decided only once or separately for each cause of action which arose before *Wilson*. Due consideration of the purposes of *Wilson*, however, suggests that a comprehensive approach to retroactivity is more appropriate. Nonetheless, if this Court should conclude that a case-by-case approach is required, the result in this case would be the same—*Wilson* should not retroactively alter the limitations period.

limitations inform the decision on *Wilson*'s retroactivity. Statutes of limitations do not create substantive rights. Instead they further society's interest in respose by limiting access to the forum in which violations of substantive rights may be proven. It may, in many cases, be harsh to declare that a right thought to be supported by precedent does not in fact exist. But it is far more harsh to declare that a proven or provable violation of an admittedly existing right must go unremedied because of an unforeshadowed change in the rules governing access to the forum. *Cf. Chevron*, 404 U.S. at 108 n.10. In short, special care must be taken to ensure that changes in limitations periods not be used to permit wrongdoers to inequitably escape the consequences of their misconduct.[16]

Against this background it can readily be seen that *Wilson* should not be applied retroactively to alter limitations periods in cases which were pending when *Wilson* was announced.

B. *Wilson* Established A New Principle Of Law.

The first *Chevron* factor inquires whether the judicial decision in question established a new principle of law *either* by overruling clear past precedent *or* by deciding an issue of first impression in a manner which was not clearly foreshadowed. *Wilson* satisfies this criterion, for *Wilson* not only abandoned the approach previously followed by this Court, but also overruled limitations precedent in the Third Circuit and every other circuit.

1. *Wilson* Abandoned The Approach Followed In Past Supreme Court Cases.

This Court's pre-*Wilson* decisions concerning statute of limitations selection in civil rights cases stressed the need for

16. While a defendant's interest in repose is undoubtedly important, *see Wilson*, 105 S. Ct. at 1944-45, it is essentially a forward-looking interest. This is true because a defendant's expectation of freedom from the risk of suit can only be based on the state of the law during the time between the accrual of the cause of action and the filing of suit. Thus, a change in limitations doctrine which shortens the limitations period *after* suit has been filed cannot be said to further any legitimate interest in repose.

deference to each court of appeals' separate choice of applicable limitations law, except in cases where that choice was *manifestly* at odds with the implementation of the federal civil rights statute at issue. Nothing in those decisions suggested any disapproval of differing court of appeals characterizations of civil rights claims, based in part on differing state limitations laws. To the contrary, the Court had explicitly stated that lack of uniformity in the limitations selection process was *not* at odds with federal civil rights policy.

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that state law provided both the limitations period and the applicable tolling rules for actions under Section 1981. Declaring that Section 1981 "on its face relates primarily to racial discrimination in the making and enforcement of contracts," *id.* at 459, the Court stated that the limitations period to be applied was "ordinarily . . . the most appropriate one provided by state law." *Id.* at 462, citing *O'Sullivan v. Felix*, 233 U.S. 318 (1914).[17] The Court emphasized that it had employed state law in "a variety of cases" which raised issues of "the overtones and details of application" of state limitations provisions to federal causes of action—including the issue of the "characterization of the cause of action." *Id.* at 464, citing *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).[18]

17. The District Court and the Sixth Circuit in *Johnson* had applied the one-year Tennessee statute of limitations expressly governing claims under federal civil rights statutes. This Court noted that its limited grant of certiorari precluded it from determining whether some other Tennessee limitations provision might be more appropriate—mentioning as possibilities the Tennessee contract limitations statute and the catchall limitations provision. The Court also noted that it did not consider whether application of the one-year provision impermissibly discriminated against the federal cause of action. 421 U.S. at 462 n.7.

18. In *Auto Workers v. Hoosier Cardinal Corp.*, the Court held that Indiana limitations law applied to claims under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, brought by a union against an employer. Rejecting the contention that the Court should create a federal limitations period for such claims, the Court stated as follows:

> We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a

One year after *Johnson*, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court faced the very question presented in the present case—the selection of a statute of limitations for a claim under Section 1981. The Fourth Circuit, interpreting Virginia law, had applied Virginia's personal injury limitations statute to plaintiff's Section 1981 claims. The plaintiff contended, however, that Virginia's personal injury statute should not have been applied to his Section 1981 claims because the Virginia limitations provision applied only to claims for *bodily* personal injuries while plaintiff's claims did not involve bodily injury.

Rather than embracing a requirement of a uniform national personal injury characterization for Section 1981 claims, the Court in *Runyon* instead called the plaintiff's contention "certainly a rational one," 427 U.S. at 181, but declined to approve it *solely* because of the Court's expressed deference to the judgments of the courts of appeals in applying the law of the states within their respective jurisdictions. Noting that neither the Fourth Circuit nor the Virginia state courts had ever limited Virginia's personal injury statute of limitations to claims of bodily injury, the Court stated:

> We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law, particularly when the established rule has been relied upon and applied in numerous suits filed in the Federal District Courts in Virginia. In other situations in which a federal right has depended upon the interpretation of state law, "the Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion."

427 U.S. at 181-82 (citations and footnote omitted).[19]

question of federal law. *But there is no reason to reject the characterization that state law would impose* unless that characterization is unreasonable or otherwise inconsistent with national labor policy.

383 U.S. at 706 (citations omitted) (emphasis added).

19. *Compare Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 902 (3d Cir. 1977), in which the Third Circuit explicitly recognized that Pennsylvania's personal injury limitations provision (unlike Virginia's) did apply *only* to claims of *bodily* injury. The Third Circuit has reiterated this distinction between Pennsylvania and Virginia limitations law. *See Davis v. United States Steel Supply*, 581 F.2d 335, 337-38 (3d Cir. 1978); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 476-77 (3d Cir. 1978), *cert. denied*, 444 U.S. 632 (1979). *See also Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972) (declining to apply Kentucky personal injury statute to Section 1983 employment discrimination claim, because Kentucky provision interpreted to cover only claims of bodily injury).

By calling "rational" the contention in *Runyon* that a state limitations provision governing only bodily injuries would not apply to Section 1981 claims involving only nonbodily injury, this Court echoed its nonretroactivity decision in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). In *Allen*, the Court concluded that the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.*, applied to certain changes in state elections laws in Mississippi and Virginia. The Court held, however, that its decision should be applied purely prospectively (*i.e.*, not even to the litigants before the Court). In reaching this conclusion, the Court placed special emphasis on the fact that the case involved "complex issues of first impression—issues subject to *rational* disagreement." 393 U.S. at 572 (emphasis added).

Although this Court in *Runyon* had ample opportunity to require a uniform federal characterization for Section 1981 claims, the Court did not do so. To the contrary, there was nothing in *Runyon* which suggested that a uniform national characterization was to be given claims under Section 1981 or that the Third Circuit's application of Pennsylvania limitations law would be given any less deference than the Fourth Circuit's application of Virginia law.[20]

20. The Fourth Circuit clearly did not intend its holding in *Runyon*, 515 F.2d 1082 (4th Cir. 1975), to mean even that a uniform *circuit-wide* personal injury characterization was required. The Fourth Circuit's application of a personal injury characterization in *Runyon* was based on that Court's application of a personal injury characterization for Section 1983 claims arising in Virginia in *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972). *See* 515 F.2d at 1097. Yet *after* its decision in *Runyon*, the Fourth Circuit applied the state limitations period for liabilities created by statute to Section 1983 claims arising in North Carolina, *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); and the catchall limitations provision to civil rights claims arising in Maryland. *McNutt v. Duke Precision Dental & Orthodontic Laboratories*, 698 F.2d 676 (4th Cir. 1983). In none of these cases did the Fourth Circuit mention the personal injury characterization applied in *Runyon* and *Almond v. Kent*. As set forth in text above, this varying approach was fully consistent with this Court's pre-*Wilson* teaching.

Deference to state limitations doctrine in federal civil rights suits was again embraced in *Robertson v. Wegmann*, 436 U.S. 584 (1978) (Louisiana survivorship statute applied in civil rights action); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (New York tolling rules applied to claims under Section 1983); and *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (Puerto Rico savings statute applied to claims of class members after class certification of civil rights action was denied). Significantly, in stressing the applicability of state limitations doctrines, this Court explicitly *minimized* the interest of uniformity in limitations selection issues in civil rights claims governed by Section 1988:

> In addition to referring to the policies underlying section 1983, the Court of Appeals based its decision [to create a federal rule of survivorship] on the desirability of uniformity in the application of the civil rights law and on the fact that the federal courts have allowed survival "in other areas of particular federal concern . . . where statutory guidance on the matter is lacking." 545 F.2d at 985. . . . [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable, Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

Robertson v. Wegmann, 436 U.S. at 593 n.11; *see also Board of Regents v. Tomanio*, 446 U.S. at 488-89; *Chardon v. Fumero Soto*, 462 U.S. at 657 n.9.

Even when this Court finally found a state limitations statute inconsistent with the purposes of a federal civil rights law, there was no hint that *Wilson* was in the wings. In *Burnett v. Grattan*, 104 S. Ct. 2924 (1984), the Court affirmed the Fourth Circuit's rejection of a state limitations provision which governed the filing of state administrative civil rights proceedings. Affirming the Court of Appeals' application of Maryland's catchall limitations provision to claims under Sections 1981, 1982, 1983 and 1985, the Court confirmed that the policies and objectives of the state administrative procedure differed significantly from the goals of the federal civil rights laws. There was, however, no warning in *Burnett*, decided less than a year before *Wilson v. Garcia*, that a uniform national characterization was required or that limitations selections by the courts of appeals needed a more uniform approach. Indeed, in a concurring opinion in *Burnett v. Grattan*, Justice Rehnquist stated:

> This desire for uniform treatment of federal civil rights claims is at odds with the fact that Congress has seen no need to establish a uniform approach in federal civil rights actions. More significantly, it fails to recognize that a state statute of limitations can still be consistent with federal law notwithstanding the fact that the particular statute of limitations applies only to a particular class of claims cognizable under a federal civil rights statute, or involves a particular class of parties.

104 S. Ct. at 2934 (citations omitted).

Thus, *Wilson*'s requirement of a uniform national characterization for each civil rights statute was a novel requirement which was not augured by previous decisions of this Court.[21] By comparison to *Rodrigue*'s interpretation of the Lands Act, *Wilson*'s reading of Section 1988 to require a uniform national characterization for Section 1983 was far more startling and less foreseeable. Whereas the Court in *Rodrigue* pointed to ample legislative history to support its conclusion, 395 U.S. at 361-66, the Court in *Wilson* stated only that "practical considerations" explained the need for a uniform federal characterization and that the adoption of a single characterization was "consistent with the *assumption* that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task." 105 S. Ct. 1945-47 (emphasis added). Thus, if *Rodrigue* satisfied the *Chevron* criterion of establishing a new and unforeshadowed principle of law, there can be no doubt that *Wilson* also satisfies that criterion.

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21. As Justice O'Connor described the *Wilson* decision:

> Thus with hardly a backward look, the majority leaves behind a century of precedent.

105 S. Ct. at 1951 (1985) (O'Connor, J., dissenting).

2. *Wilson* Overruled Established Circuit Court Precedent.

In the Third Circuit, *Wilson* overruled a long line of cases establishing both the method by which limitations periods were to be determined in civil rights cases and the precise limitations period to be applied in cases alleging employment discrimination under Section 1981. With respect to the method to be applied, the Third Circuit had consistently held, before *Wilson*, that in actions under Sections 1981 and 1983 the appropriate statute of limitations should be determined by looking at the facts of each particular case. In 1967, the Third Circuit held that, in actions brought under Section 1983, "the applicable Statute of Limitations is that which the state would enforce had the action seeking similar relief been brought in State Court." *Hennig v. Odorioso*, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968). In implementing this principle, the Court went on to look at the specific facts of the case at hand, one sounding in false arrest, slander, malicious prosecution and false imprisonment. *Id.* at 493.

Similarly, in *Ammlung v. City of Chester*, 494 F.2d 811 (3d Cir. 1974), the Third Circuit reaffirmed the principle that the facts of the case in question were central in determining the appropriate statute of limitations in Section 1983 cases. Citing the 1963 case of *Conard v. Stitzel*, 225 F. Supp. 244, 247 (E.D. Pa. 1963), the Court stated explicitly that "the applicable statute of limitations must be determined from the nature of the conduct alleged." 494 F.2d at 814. *See also Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc).

But *Wilson* did not simply reject the fact-specific approach which had been used by the Third Circuit for approximately eighteen years at the time *Wilson* was decided. In addition, the Third Circuit's reading of *Wilson* to require a uniform personal injury characterization for all Section 1981 claims, overruled a consistent line of Third Circuit precedent which had *rejected* the application of Pennsylvania's two-year personal injury statute to claims under Section 1981. *See Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977); *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978); *Liotta v. National Forge Co.*, 629 F.2d 903, 906 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

These cases had explicitly recognized that Pennsylvania's two-year personal injury limitations statute applied only to claims of bodily injury and was therefore not the most analogous for Section 1981 claims which involved nonbodily injury.[22] Thus, the Third Circuit interpreted *Wilson* to have overruled both the method and the result of prior Third Circuit precedent.[23]

Wilson's displacement of existing case law was not limited to the Third Circuit. Indeed, before the Tenth Circuit altered its limitations selection rules in the decision which was affirmed by this Court in *Wilson* itself, no court of appeals had uniformly applied a personal injury characterization to all civil rights claims raised within its circuit.[24]

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22. Although it was not until 1977 that the Third Circuit, in *Meyers*, *supra*, explicitly declared the six-year limitations provision applicable to Section 1981 claims, previous analogous cases, decided before the present lawsuit was filed, strongly suggested that the six-year Pennsylvania provision was the most analogous for claims such as plaintiffs'. For example, in *Gainey v. Brotherhood of Ry. & Steamship Clerks*, 275 F. Supp. 292 (E.D. Pa. 1967), *aff'd* 406 F.2d 744 (3d Cir. 1968), *cert. denied*, 394 U.S. 998 (1969), the district court, in adjudicating a class action by union members under the Railway Labor Act for breach of the duty of fair representation, held squarely that "[t]he Pennsylvania six-year statute of limitation [*i.e.*, the statute governing claims of interference with economic interests] applies." *Id.* at 306. Similarly, in *Haefele v. Davis*, 399 Pa. 504, 160 A.2d 711 (1960), the Pennsylvania Supreme Court recognized without question that a claim of tortious interference with employment rights was subject to the six-year limitations provision. *Id.* at 511. *See also Falsetti v. Local 2026*, 249 F. Supp. 970, 972 (W.D. Pa. 1965), *aff'd*, 355 F.2d 658 (3d Cir. 1966); *cf. Page v. Curtiss-Wright Corp.*, 332 F. Supp. 1060 (D.N.J. 1971) (applying New Jersey contract limitations provision to Section 1981 employment discrimination claim against employer and union). Indeed, when the Third Circuit, in *Meyers*, declared the six-year limitations provision applicable to claims of housing discrimination under Section 1981, the Court cited six factually similar pre-1970 cases in which the six-year limitations provision had been applied. 559 F.2d at 902-3.

23. In fact, the Third Circuit recognized in this case that its reading of *Wilson* resulted in an "anomalous" limitations selection which was "not fully consistent" with state law. 777 F.2d at 120 n.3.

24. *See Small v. Inhabitants of Belfast*, 617 F. Supp. 1567, 1571 (D. Me. 1985) (*Wilson* rejected First Circuit's settled practice of looking to facts underlying particular § 1983 claim for an appropriate state law analog), *rev'd on other grounds*, 796 F.2d 544 (1st Cir. 1986); *Villante v. Dept. of Correc-*

Set in this context, nonretroactive application of *Wilson* is even more compelling than was nonretroactive application of *Rodrigue*. For while the Court in *Chevron* noted only that *Rodrigue* overruled Fifth Circuit precedent, 404 U.S. at 107, the new *Wilson* limitations principle overruled case law in *every* circuit. Under such circumstances, unless nonretroactive application of *Wilson* would retard its purposes or create inequity, *Wilson* should not be applied retroactively to alter

tions, 786 F.2d 516, 520 n.2 (2d Cir. 1986) (mandate of *Wilson* differs from Second Circuit's prior application of limitations period for actions based on statute to § 1983 claims); *Smith v. City of Pittsburgh*, 764 F.2d 188, 192-93 (3d Cir. 1985) (*Wilson* adopted approach contrary to Third Circuit's practice of characterizing § 1983 claims individually on an ad hoc basis); *cert. denied*, 106 S. Ct. 349 (1985); *Gates v. Spinks*, 771 F.2d 916, 918 (5th Cir. 1985) (before *Wilson* Fifth Circuit selected state limitation period application to the state cause of action most analogous to the particular § 1983 action filed), *cert. denied*, 106 S. Ct. 1378 (1986); *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986) (before *Wilson* Seventh Circuit had applied limitations period for statutory causes of action to § 1983 claims); *Ridgway v. Wappello County, Iowa*, 795 F.2d 646 (8th Cir. 1986) (before *Wilson*, Eighth Circuit applied general statutes of limitations to § 1983 claims); *Marks v. Parra*, 785 F.2d 1419 (9th Cir. 1986) (*Wilson* overruled Ninth Circuit's practice of applying, wherever possible, limitations periods for actions created by statute to § 1983 claims); *Jackson v. City of Bloomfield*, 731 F.2d 652, 654 (10th Cir. 1984) (en banc) (*Wilson* rejected Tenth Circuit's previous approach of comparing the particular facts underlying the 1983 claim to factually similar state law actions); *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1253 (11th Cir. 1985) (before *Wilson*, the Eleventh Circuit's practice was to characterize the essential nature of § 1983 claims in varying contexts), *cert. denied*, 106 S. Ct. 893 (1986); *Hobson v. Brennan*, 625 F. Supp. 459, 463 (D.D.C. 1985) (*Wilson* foreclosed D.C. Circuit's prior, flexible approach of selecting applicable period according to the nature of the underlying claim). Before *Wilson*, the Sixth Circuit's choice of limitations periods for § 1983 claims varied according to the available statutes and the facts of each case. *See, e.g., Kilgore v. City of Mansfield*, 679 F.2d 632, 634 (6th Cir. 1982) (applying statute governing actions for malicious prosecution and false imprisonment to § 1983 claim arising from arrest); *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972) (applying statute governing statutory actions to § 1983 claim arising out of forced pregnancy leave).

Although the Fourth Circuit had used a personal injury characterization for civil rights claims in Virginia, it applied the North Carolina limitations provision for liability created by statute to § 1983 claims arising in North Carolina, and the Maryland catchall limitations provision to civil rights claims arising in Maryland. *See* note 20 above.

limitations provisions in cases pending when *Wilson* was decided.

C. Nonretroactive Application Promotes The Purposes Of *Wilson*.

Wilson's single uniform characterization requirement sprang from the Court's desire to achieve uniformity and certainty in statute of limitations decisions and to minimize collateral litigation, while at the same time safeguarding the important interests of federal civil rights litigants. *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986). Each of these goals is served by nonretroactive application of *Wilson*.

The present case serves as a poignant example why uniformity and certainty will not be promoted by limitations changes in pending cases through retroactive application of *Wilson*. This class action has progressed through the judicial system for almost fourteen years. The class certified by the District Court under pre-*Wilson* limitations law included persons whose claims arose as much as eighteen years before the *Wilson* decision. The interest which *Wilson* may have in promoting uniformity and certainty in statutes of limitation cannot be advanced by *changing* the applicable statute of limitations after those parties have fully tried their case under established pre-*Wilson* limitations law.[25]

25. Indeed, the goal of uniformity (and the goal of minimization of collateral litigation) are wholly frustrated by the Third Circuit's decision to apply *Wilson* retroactively to suits, such as this one, filed before *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977), but nonretroactively to suits filed after *Meyers*. *See Al-Khazraji v. St. Francis College*, 784 F.2d 505, 511-14 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986); *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986). This case-by-case approach, requiring a determination of *when* circuit law became clear, breeds collateral litigation and will inevitably result in nonuniform treatment of pre-*Wilson* cases. It is particularly anomalous in light of the Third Circuit's statement in *Meyers* that "the case law is *clear*. In state law suits resembling *Meyers*' action, both Pennsylvania courts and federal courts applying Pennsylvania law have *uniformly* applied the six year limitation [provision]." 559 F.2d at 902-03 (emphasis added) (citations and footnote omitted).

In a recent case, the Third Circuit appears to have abandoned the prac-

Retroactive application would also interfere with uniformity by causing claims which accrued on the same date and suits which were filed on the same date to be governed by different limitations periods, depending on whether or not they had reached final judgment or settlement when *Wilson* was decided. Limitations determinations would thus hinge on the complexity of a case and how fast it was processed through the judicial system. In the present case, the District Court was faced with thousands of pages of transcript and post-trial submissions, and did not render its liability decision until three and one-half years after trial. At the time *Wilson* was announced, this case had already been briefed in the Court of Appeals. Had the District Court's liability decision come sooner, the case might well have been resolved before *Wilson*. (It is noteworthy that plaintiffs reached a settlement with defendant Lukens Steel Company which was filed with the District Court for approval less than eight months after the Court of Appeals decided the appeal.)

The present case also demonstrates why collateral litigation would not be minimized by retroactive application of *Wilson*. First, retroactive application of *Wilson* required relitigation of the statute of limitations issue, which was already settled under prior law. 777 F.2d at 118. (*Pet. App.* A-8.) Second, solely because of the change in limitations rules wrought by *Wilson*, the Third Circuit vacated and remanded the case to the District Court for reconsideration of the liability findings concerning toleration of racial harassment and discrimination in salaried promotions. 777 F.2d at 121. (*Pet. App.* A-14 to A-16.) But for the retroactive change in limitations rules, the Third Circuit would have affirmed those find-

tice of determining when circuit law became clear. In *Brown v. Foley*, No. 86-5389 (3d Cir. Jan. 26, 1987), the Third Circuit declined to apply *Wilson* retroactively to shorten the statute of limitations in a Section 1983 case. In so holding, the Court noted that pre-*Wilson* Third Circuit cases had applied a longer New Jersey limitations period than the one applicable under the new *Wilson* selection rule. The pre-*Wilson* cases upon which the Court relied were, however, decided *after* the plaintiff in *Brown* filed suit and after his cause of action would have expired under the shorter limitations period. The decision in *Brown* cannot be squared with the Third Circuit's decision in the present case.

ings, and additional litigation in this case would have been minimized. While retroactive application of *Wilson* may, in some cases, minimize litigation by ending plaintiff's case, in other cases such as this one alteration of the limitations period will lead to years of additional litigation.

Retroactive application of *Wilson* to alter limitations periods in pending cases would not just impede uniformity and certainty and cause collateral litigation. Where retroactive application of *Wilson* shortens the limitations period, the remedial purpose of Section 1981 is likely to be frustrated as well.

> [T]otal retroactive application of *Wilson* would preclude some plaintiffs from vindicating constitutional rights protected by section 1983 simply because the time for filing a suit had been reduced after the cause of action accrued or, as demonstrated by this case, after the litigation had begun.

Anton v. Lehpamer, *supra*, 787 F.2d at 1145. The present case provides an even more compelling example, for here retroactive application of *Wilson* will result in denial of a remedy to some of the named plaintiffs and other class members for racial discrimination which was actually *proven at a trial*.[26] To eliminate their remedy now, on the basis of a newly established rule of limitations selection, "would surely be inimical to the beneficent purpose of the Congress." *Chevron*, 404 U.S. at 108.

For these reasons, legislative changes in limitations law are usually not applied retroactively to cases pending at the time of the legislative change. *See*, *e.g.*, *United States v. St. Louis S.F. & T. Ry.*, 270 U.S. 1 (1926); *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry.*, 266 U.S. 435 (1925); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 477 n.2 (3d Cir. 1978), *cert. denied*, 444 U.S. 632 (1979); 12 P.S. § 31 (repealed) (*Pet. App.* A-178 to A-179); *cf. Anton v. Lehpamer*, *supra*, 787 F.2d at 1146 n.6. While the new rule announced in *Wilson* was not a legislative act, it was undoubtedly an exercise of this Court's "interstitial" rulemak-

26. *See* note 4 above.

ing authority to fill gaps left in Congressional legislation. *See Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158-59 (1983).[27] Certainly the *Wilson* rule requiring a uniform federal personal injury characterization for Section 1983 claims is not explicit in either Section 1988 or Section 1983. To the contrary, the Court developed the new rule in response to the practical desire to minimize litigation over statutes of limitation. But just as legislatures usually do not enact limitations changes retroactively, so should this Court recognize that interstitial limitations rulemaking, when as unforeseeable as *Wilson*, is inappropriate for retroactive treatment.

D. Substantial Inequity Would Result If *Wilson* Were Applied Retroactively To Alter Limitations Periods In Cases Which Were Pending At The Time *Wilson* Was Decided.

The final *Chevron* factor requires that the Court weigh the potential inequity which retroactive application would impose. In *Chevron*, the Court noted that it would be substantially inequitable to hold plaintiff's claims time barred when before *Rodrigue* "he could not have known the time limitation that the law imposed upon him." 404 U.S. at 108.

Once again, the similarities between *Rodrigue* and *Wilson* are striking. In both *Rodrigue* and *Wilson* the Court engaged in statutory construction. In both cases, the resulting statutory principle was not apparent from the statute itself. In both cases, the resulting construction of the statute caused new rules to govern limitations selection in an area where Congress had not adopted a federal period of limitations. Yet by comparison, retroactive application of *Wilson* would be more inequitable than retroactive application of *Rodrigue*, because *Wilson* was less foreseeable than *Rodrigue*.

27. As Judge Friendly has noted, "selection of a period of years *not being the kind of thing judges do*, federal judges should borrow the limitation statutes of the states where they sit." *Movie Color Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir.) (emphasis added), *cert. denied*, 368 U.S. 821 (1961). The authority to fill gaps left in federal legislation applies here because Congress has failed to adopt limitations periods for claims under Sections 1981, 1982 and 1983.

As set forth above, *Rodrigue*'s construction of the Lands Act was based on abundant legislative history and did not depart from prior Supreme Court precedent. 395 U.S. at 361-66. In *Wilson*, however, there was no reference to any legislative history of Section 1988 which explicitly supported the single federal characterization requirement found by the Court. Instead, as this Court stated in *Wilson*, "practical considerations help to explain why a simple, broad characterization of all Section 1983 claims best fits the statute's remedial purpose." 105 S. Ct. at 1945. But, as set forth above, this practical desire for uniformity and simplicity caused the overruling of existing precedent in every circuit and directly undercut prior Supreme Court precedent which had minimized the importance of such goals.

Retroactive application of this upheaval in limitations selection will lead to egregiously inequitable results. In every federal circuit litigants could justifiably have waited to file suit, based on circuit precedent which appeared to be fully consistent with the pre-*Wilson* pronouncements of this Court on limitations selection. *See* note 24 above. In fact, they may well have delayed in order to await the results of administrative proceedings under Title VII.[28] To the extent that the statutes of limitations applicable under *Wilson* are shorter than the previously applied limitations period, such litigants may be left with no remedy for violations of Section 1981. *See, e.g., Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986); *Pratt v. Thornburgh*, No. 86-1187 (3d Cir. December 15, 1986); *Ridgway v. Wapello County, Iowa*, 795 F.2d 646 (8th Cir. 1986).

Litigants and courts are also likely to have invested substantial time and resources in litigating disputes under prior limitations precedent. For example, the inequity of retroactive

28. Although the Title VII administrative process does not toll the statute of limitations under Section 1981, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), it nevertheless makes sense for plaintiffs to await the result of that process when the Section 1981 limitations period appears to allow them to do so. If the administrative process achieves its objective, the claim may be settled without the necessity for any court proceedings, thereby advancing *Wilson*'s goal of minimizing collateral litigation. *See Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 903 n.26 (3d Cir. 1977).

application which this Court found would result after a single year of discovery in *Chevron* is dwarfed by the twelve years of pre-*Wilson* discovery, investigation, preparation, motions, trial and appeal which took place in the present case. During discovery, over 100 depositions were taken and hundreds of thousands of pages of documents were produced. The transcript of the 32-day trial is more than 5,800 pages long; 157 witnesses testified; more than 2,000 exhibits were admitted.

Moreover, the District Court *actually found* in favor of plaintiffs on most of the liability issues in this massive class action. (*Pet. App.* A-160 to A-161; A-163.) To now apply retroactively a novel change in limitations rules which denies a remedy to hundreds of victims of *proven* racial discrimination, after the passage of fourteen years since the filing of this suit, would turn the natural law "fiction"—that judges merely "discover" the law—into a real life weapon, wielded unfairly. *See Griffin v. Illinois*, 351 U.S. 12, 2b (1956) (Frankfurter, J., concurring in the judgment). In *Chevron*, this Court stated that "nonretroactive application ... simply preserves [plaintiffs'] right to a day in court." 404 U.S. at 108. In this case, nonretroactive application preserves plaintiffs' right to relief after plaintiffs *prevailed* on the merits during their day in court.

The inequity in this case was underscored by the Third Circuit. In holding that *Wilson* required application of the two-year bodily personal injury limitations period to plaintiffs' claims of economic injury, the Court of Appeals recognized that selection of the two-year statute was "seemingly anomalous" and "not fully consistent" with state law. 777 F.2d at 120 n.3. While this departure from state law might well be acceptable in a case where the plaintiff had notice of *Wilson*, it is profoundly unjust where plaintiffs had no reason to anticipate the subordination of state law principles to *Wilson*'s new found desire for uniformity.[29] In view of the command of

29. At the time this suit was filed the only case within the Third Circuit which had characterized a Section 1981 claim, for statute of limitations selection, was *Page v. Curtiss-Wright*, *supra*. In that case the New Jersey District Court applied the six-year New Jersey contract limitations period to plaintiff's employment discrimination claims against his employer and

Section 1988 to look to state law, plaintiffs cannot be held to have foreseen an anomalous limitations selection which is inconsistent with state law.[30]

The third *Chevron* factor, therefore, tips heavily against retrospectively applying *Wilson* to alter limitations periods in cases that were pending when *Wilson* was announced.

E. *Wilson* Should Be Implemented As Quickly As Justice Permits, But Should Not Be Applied Retroactively To Alter Limitations Periods In Cases Which Were Pending At The Time *Wilson* Was Decided.

The courts of appeals have differed broadly over the retroactive application of *Wilson*. *Mulligan v. Hazard*, 106 S. Ct. 2902 (1986) (White and Marshall, JJ., dissenting from denial of Petition for Certiorari). The Ninth Circuit has decided the issue based on whether *Wilson* lengthens or shortens the

union. Circuit courts which had faced the question before the present case was filed had applied a contract limitations statute, a residual limitations statute or a limitations period for statutory claims. *See Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973) (either contractual, statutory or residual claim statute); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 994 & n.28 (D.C. Cir. 1973) (either residual or contractual claims); *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 340 (8th Cir. 1972) (contractual statute); *Waters v. Wisconsin Steel Workers Int'l Harvester Co.*, 427 F.2d 476, 488 (7th Cir.), *cert denied sub nom. United Order of American Bricklayers & Stone Masons, Local 21 v. Waters*, 400 U.S. 911 (1970) (residual statute); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5th Cir. 1973) (residual statute for recovery of wages); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971) (contract statute). In Pennsylvania at the time this suit was filed, all of these characterizations would have fallen within the six-year limitations provision at 12 P.S. § 31.

30. Surely *the defendants* in this case did not foresee *Wilson*. Before the *Wilson* decision, the Unions' appeal of the District Court's decision in this case did not even raise the issue of the Section 1981 statute of limitations. Even Lukens, which raised the issue in its appeal, did not rely on or even mention the possibility of a uniform national personal injury characterization, until after this Court decided *Wilson*. Only *after* the *Wilson* decision did Lukens and the Unions submit supplemental briefs addressing the characterization rule established in *Wilson*; and then only in response to a direct *sua sponte* request by the Third Circuit.

pre-*Wilson* limitations period. *Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir. 1985); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986). The Tenth Circuit, too, has stressed this factor, although not expressly declaring it dispositive. *Jackson v. City of Bloomfield*, 731 F.2d 652, 654-55 (10th Cir. 1984).

The First, Sixth and Eleventh Circuits, on the other hand, have given *Wilson* across-the-board retroactive effect. *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986); *cf. Simpson v. Director, Office of Workers' Compensation Programs*, 581 F.2d 81 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983); *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986); *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied* 106 S. Ct. 2902 (1986); *Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1253 n.2 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986). The Third and Eighth Circuits have adopted a case-by-case inquiry, holding *Wilson* retroactive under some circumstances, *Bartholomew v. Fischl*, 782 F.2d 1148 (3d Cir. 1986); *Wycoff v. Menke*, 773 F.2d 983 (8th Cir. 1985); and nonretroactive in others. *Brown v. Foley*, *supra* (3d Cir.); *Pratt v. Thornburgh*, *supra* (3d Cir.); *Ridgway v. Wapello County, Iowa*, *supra* (8th Cir.).

The Seventh Circuit has adopted an approach different from those described above. In *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1980), after applying the three *Chevron* factors, that Court established a broad rule designed to implement *Wilson* "as quickly as justice permits." 787 F.2d at 1146. Recognizing the potential for inequity which could result from complete retroactive application of *Wilson*, the Seventh Circuit held that:

> in Illinois, a plaintiff whose Section 1983 cause of action accrued before the *Wilson* decision, April 17, 1985, must file suit within the shorter period of either five years from the date his cause of action accrued or two years after *Wilson*.

Id. (footnote omitted).[31]

31. Before *Wilson*, the applicable limitations period in Illinois for Section 1983 claims was held to be five years. *Anton*, 787 F.2d at 1144. Under *Wilson*, the two-year period applies. *Id.* at 1142.

The broad approach adopted in *Anton* is best suited to achieve *Wilson*'s goals of uniformity, consistency, minimization of collateral litigation and preservation of the remedial aims of the civil rights laws. Indeed, the extensive litigation which has stemmed from a case-by-case approach to *Wilson*'s retroactivity is flatly at odds with the goals of *Wilson*.

In view of *Wilson*'s establishment of a new and unforeseeable limitations selection rule and the substantial potential for inequity inherent in retroactive application, *Chevron* teaches that *Wilson* should not be applied to alter limitations periods in cases which were pending when *Wilson* was decided. For other claims which arose before *Wilson*, but were filed after *Wilson*, the limitations period should be the shorter of either the limitations period applicable under *Wilson* (measured from the date of *Wilson*) or the pre-*Wilson* limitations period established by circuit law.[32] This rule provides a broad, principled and straightforward solution to the issue of *Wilson*'s retroactivity, while at the same time adhering to the goals and values expressed in both *Chevron* and *Wilson*. In cases such as the present one, where the Circuit Court had established an applicable pre-*Wilson* limitations period, the rule would prevent *Wilson* from frustrating the legitimate expectations of either plaintiffs or defendants.[33]

32. In cases in which there is no applicable pre-*Wilson* precedent or in which pre-*Wilson* precedent yields the same limitations result as *Wilson*, the *Wilson* rule would apply because there would be no issue of retroactivity.

33. The issue of retroactivity where *Wilson* would lengthen the pre-*Wilson* limitations period is not directly raised in this case. In such cases, those courts of appeals which have considered the issue have applied *Wilson* retroactively. *Bartholomew v. Fischl*, 782 F.2d 1148, 1155-56 (3d Cir. 1986); *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986); *Farmer v. Cook*, 782 F.2d 780 (8th Cir. 1986); *Rivera v. Green*, 775 F.2d 1381, 1383-84 (9th Cir. 1985); *Marks v. Parra*, 785 F.2d 1419 (9th Cir. 1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (llth Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986). This result recognizes that retroactive resuscitation of a claim previously thought dead is not likely to be as harsh as the premature burial of a claim thought to be alive. On the other hand, when a plaintiff's claim expired under clear limitations law in effect before *Wilson*, the plaintiff could have had no reasonable basis to believe that the longer post-*Wilson* limitations period would apply. On balance, a principled approach requires similar

CONCLUSION

In this case, the Third Circuit erred by applying to plaintiffs' claims under Section 1981 Pennsylvania's two-year limitations period for actions for damages for personal bodily injury. When these claims are properly characterized as claims for tortious interference with existing or prospective contractual relations, the applicable limitations period is Pennsylvania's six-year limitations provision at 12 P.S. § 31.

Even if the Court of Appeals' characterization is held to have been proper, the uniform federal characterization rule of *Wilson* should not have been applied retroactively to alter pre-*Wilson* limitations rules in cases, such as this one, which were filed before the decision in *Wilson*. Because clear pre-*Wilson* limitations law in the Third Circuit required application of Pennsylvania's six-year limitations period to plaintiffs claims, that period should be applied.

Accordingly, this Court should reverse the Court of Appeals' application of Pennsylvania's two-year statute of limitations to plaintiffs' claims. Further, because the Third Circuit relied solely on its statute of limitations ruling to vacate and remand the District Court's findings of discrimination in toleration of racial harassment and denial of salaried promotions, this Court should reinstate those findings.

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treatment whether *Wilson* lengthens or shortens the limitation period, particularly in view of *Wilson*'s desire to avoid the appearance of result-oriented rulings. *See* 105 S. Ct. at 1945 n.24.

Respectfully submitted this 5th day of February, 1987,

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